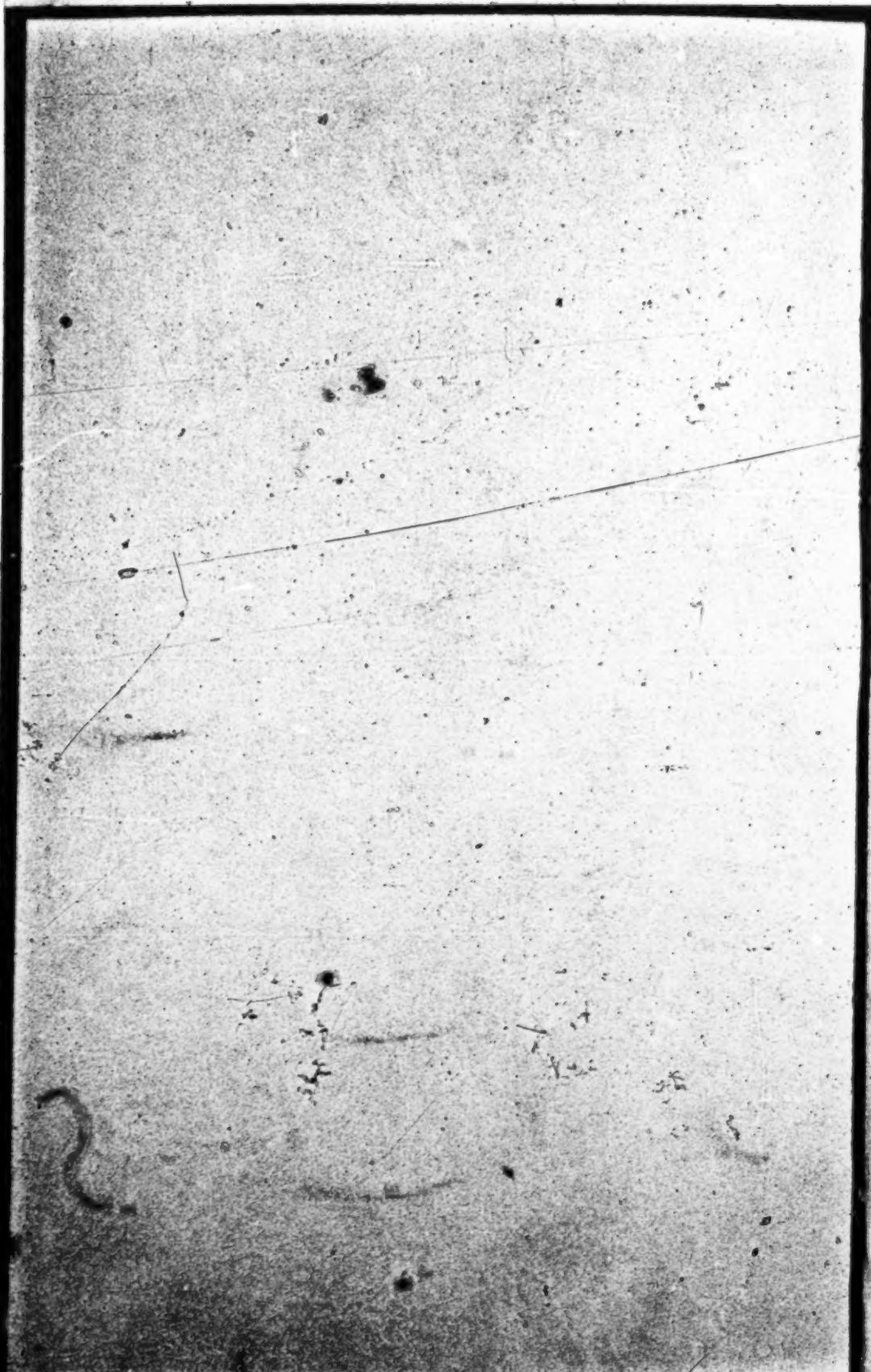

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In the Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1964~~ 79

TV PIX, INC. and WELLS TV, INC.,
Appellants,

v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101

PAUL A. RICHARDS
248 So. Sierra Street
Reno, Nevada 89505

Attorneys for Appellants

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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1224

TV PIX, INC. and WELLS TV, INC.,
Appellants,
v.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

AUTHORITY FOR FILING

This brief is filed pursuant to the provisions of Rule 16(3) of the Rules of this court. The Appellees' "Motion to Dismiss or Affirm" was received by counsel for the Appellants on May 16, 1967.

POINT I.

APPELLEES STATE NO GROUNDS UPON WHICH TO DISMISS THE APPEAL.

Rule 16(1)(a) of the Rules of this court provides that:

> "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court because not taken in conformity to statute or to these rules."

The State of Nevada concedes in the last paragraph on page 8 of the "Motion to Dismiss or Affirm" that: "The court has jurisdiction of the appeal under 28 USCA Sec. 1253."

No contention is made by the State of Nevada that the appeal is not taken in conformity with the statute or with the rules of the court. It is submitted, therefore, that no Motion to Dismiss lies, and insofar as the Appellees' pleading purports to be a Motion to Dismiss, that such characterization is a misnomer.

POINT II.

THE MOTION TO AFFIRM SHOULD BE DENIED BECAUSE SUBSTANTIAL QUESTIONS REQUIRING ADDITIONAL ARGUMENT ARE PRESENTED.

A. *Appellees' "Statement of the Case" includes substantial misstatements of material facts.*

Appellees assert in the third paragraph of their "Statement of the Case" (Appellees' Motion to Dismiss or Affirm, p. 7), that:

> "The function of the [CATV] systems is to pick up television signals from the Nevada station and by use of wires or cables attached to telephone poles in each city in which the system

functions transmit these signals into the homes of subscribers."

This factual assertion is in direct contradiction to the Stipulation of Facts filed by the parties in the District Court. Appellants' CATV systems, in all the communities in question, pick up and deliver to their subscribers the signals of out of state stations. Paragraphs 5 and 6 of such Stipulation of Facts are as follows:

> "5. The community antenna systems in Elko and Wells deliver to their subscribers the signals broadcast by television stations KUTV, KCPX-TV and KSL-TV, Salt Lake City, Utah, from a transmitter located in the Oquirrh Mountains approximately 30 miles west of Salt Lake City. Station KUTV is affiliated with the National Broadcasting Company; station KSL-TV is affiliated with the Columbia Broadcasting Company; station KCPX-TV is affiliated with the American Broadcasting Company. The feature films and syndicated shows broadcast by KCPX-TV, KSL-TV and KUTV are generally interstate in nature and the advertisements on such stations relate to communications and services in interstate commerce.
>
> "6. TV Pix, Inc., plaintiff in No. 1814, delivers to its customers in Carson City and Stateline, the signals broadcast by KTVU, Oakland; KPIX, San Francisco; KVIE, Sacramento; KGO, San Francisco; KCRA, Sacramento; and KOVR, Sacramento. TV Pix, Inc. also delivers the signals of KOLO and KCRL, Reno, to its subscribers in Carson City and Stateline. Such Reno signals are picked up by said plaintiff within the State of Nevada for delivery to Carson City subscribers and in California for delivery to Stateline subscribers. The network affiliations of each of the stations delivered by said plaintiff

to its Carson City and Stateline subscribers are as follows: KPIX - San Francisco, Columbia Broadcasting System; KVIE - Sacramento, Educational Channel; KCRA - Sacramento, National Broadcasting Company; KTVU - Oakland, Independent; KOVR - Sacramento, American Broadcasting Company; KGO-TV - San Francisco, American Broadcasting Company; KOLO - Reno, Columbia Broadcasting System and National Broadcasting Company; KCRL - Reno, National Broadcasting Company and American Broadcasting Company."

In no known instance does a network television program or a syndicated program or feature film broadcast by the stations carried by plaintiffs' community antenna systems originate in the State of Nevada. Such programs generally originate in New York or Hollywood.

The record is clear that the signals of the Salt Lake City stations, broadcast in the state of Utah, are picked up by the Appellants TV Pix, Inc. and Wells TV, Inc. at a point within the State of Nevada and delivered to a common carrier microwave licensed by the Federal Communications Commission, transmitted by the common carrier from the point of delivery to the head-end of the Appellants' equipment at Wells and Elko, and there transmitted by a system of cables, wires and amplifiers to Appellants' subscribers.

Location of the equipment of Appellant TV Pix, Inc., utilized to pick up the California stations, is within the State of California. The signals are delivered in the State of California by TV Pix, Inc. to a common carrier microwave company and are transmitted by the

carrier to head-ends of the Appellants' systems in Carson City, Nevada, and South Tahoe, California. The system serving Tahoe, California and Stateline, Nevada is an integrated system served by one head-end. Thus, the instant case involves situations where the Appellants release to their subscribers the signals of out-of-state television stations broadcasting programs essentially interstate in origin, distribution and sponsorship.

The undisputed factual situation presented to the court is critical in determining whether the business activities of the Appellants constitute interstate commerce. The Federal Communications Commission has determined that community antenna systems constitute interstate communication by wire "since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber) —a chain which is now well established as interstate communication." Federal Communications Commission, Second Report and Order, Docket Nos. 14895, 15233 and 15971, 31 Fed. Reg. 4550.

Despite the citations in Appellants' Jurisdictional Statement, referring to the explicit decision of the FCC on this legal question, the State of Nevada persists in its unsupported conclusion that "Appellants' operation is purely intrastate." (Motion to Dismiss or Affirm, p. 14 et seq.) The factual premise upon which the Appellees' argument is predicated is wholly erroneous and the legal conclusion with respect to the interstate nature of the Appellants' business activities is directly

opposed to the determination of the federal communications expert, the Federal Communications Commission, and the rulings of two circuit courts of appeal. *cf. Idaho Microwave, Inc. v. FCC* (1965 CCA D.C.) 352 F(2d) 729; *Ward v. Northern Ohio Telephone Co.* (1962 CCA 6) 300 F(2d) 816, c. den. 371 U.S. 820, 9 L.Ed(2d) 61, 83 S. Ct. 37.

B. *The State of Nevada does not respond directly to Appellants' specific point asserting that a substantial question exists in the application of the abstention doctrine.*

The Jurisdictional Statement established that there was no unresolved state question, but that the only question involved in determining whether the state statute was applicable was whether Appellants' business activities constituted interstate commerce. (Jurisdictional Statement pp. 3, 7-11). Appellants pointed out: "Determination of whether specific conduct constitutes interstate commerce must be decided under the federal rule", (Jurisdictional Statement, pp. 7-8) and that the abstention cases authorize a District Court to defer for state adjudication all state questions but permit a reservation of the federal question by an express statement into the record in the state proceedings. (Authorities cited on pp. 8-9 of Jurisdictional Statement) Appellants suggest, therefore, that the three-judge panel misapplied the abstention doctrine.

This court held in *Turner v. Memphis* (1962) 369 U.S. 350, 7 L. Ed(2d) 762, 82 S. Ct. 805, that abstention is improperly applied in 28 USCA 2201 cases where there is no unresolved state issue to be passed

upon by a state court. The holding of *Turner* is in conflict with the language cited by the State of Nevada from *Cooper v. Hutchinson* (D. C. N.J. 1950) 88 F. Supp. 774, to the effect that a state court must first pass upon constitutional issues. Moreover, *Cooper* is not in point because jurisdiction there was under the Civil Rights Act of the United States, 8 USCA Sec. 43, and 28 USCA Sec. 1343.

Guerra v. City of Philadelphia (D. C. Pa. 1940) 30 F. Supp. 791, is not in point; the case was not brought under 28 USCA Sec. 2281. The District Court held that the amount in controversy did not involve the jurisdictional amount and the court held further that jurisdiction was denied by 28 USCA Sec. 41(1) as then in effect.

Chicago Transit Co. v. Nims (CCA 6, 1958), 252 F(2d) 317, was expressly distinguished by this court in *Idlewild Liquor Corporation v. Epstein* (1962) 370 U.S. 713, 8 L.Ed(2d) 794, 82 S. Ct. 1294, on the ground that in the *Chicago Transit* case the three-judge court "was requested only in the event that it should first be held that the state statute was by its term applicable to the plaintiff's business operations." In *Idlewild*, the court held that a three-judge court should have been convened because the complaint raised a substantial constitutional question and at least formally alleged a basis for equitable relief.

In *Phillips Petroleum Co. v. Jones* (D. C. Okla. 1955), 147 F. Supp. 122, a three-judge court was convened and ruled upon the issues presented by the plaintiff. The court held that the Oklahoma statute in ques-

tion was unconstitutional on its face, and since there had been no administrative rulings to raise a constitutional question " . . . our inquiry is at an end". *Phillips Petroleum* does not, therefore, support Appellees' position here.

Patterson v. Hardin (D. C. So. D. Ind., 1956), 145 F. Supp. 299, involved a situation where the plaintiffs sought to enjoin a state zoning statute. The decision holds that no substantial federal question was presented.

The District Court cases cited on page 18 of Appellees' Motion to Dismiss or Affirm are not in point because they involve situations where an adverse state ruling was only threatened. Here the defendants have admitted that they have made determinations that the Appellants' conduct constitutes intrastate commerce that they have jurisdiction to regulate Appellants' businesses, and that the Appellants should cease operations unless Appellees' demands are satisfied. Under the Nevada statute, the state rule is that the Appellees have "regularly performed" their duty. NRS 52.070.

Alabama Public Service Commission v. Southern Railway Co. (1951) 341 U.S. 341, 95 L. Ed. 1002, 71 S. Ct. 762, is inapposite. In that case there were unresolved state issues. In the instant case, the only unresolved issue was whether the Appellants' communications services constituted interstate commerce — a federal question. Appellants suggest that the arguments presented upon pages 7 through 11 of their Jurisdictional Statement with respect to the application of the abstention doctrine are not treated in any fashion

by the Appellees' Motion or the arguments in support of the Motion. The Appellees do not come to grips with the question as to whether abstention is properly applied where the only unresolved question involves the application of federal law. At no point in its Motion or argument does the State of Nevada suggest any unresolved state issue which should have been presented to a state court for determination.

The District Court placed emphasis upon the *Public Service Commission of Utah v. Wycoff* (1952) 344 U.S. 237, 97 L.Ed. 291, 73 S. Ct. 236. Appellants distinguish this case (pp. 9, 10 Jurisdictional Statement) on the ground that whereas in *Wycoff* the state agency had made no order raising a constitutional issue but was only considering the issuance of such an order, in the instant case, the defendants have, as state officers and acting under the state statute, determined that community antenna systems are subject to their jurisdiction. (See para. 9 plaintiffs' complaint, para. 10 defendants' answer; cf. pp. 5-6 Jurisdictional Statement). The State admits:

> "No one may assume that the [state] Commission will make an erroneous decision. For NRS 52.070, subsection 15 provides that there is a presumption: 'That official duty has been regularly performed.' "

Thus it is clear that unlike the situation in *Wycoff*, the defendants' rulings constitute an adjudication under state law that the state has the authority to regulate as public utilities Appellants' interstate communications facilities.

The Jurisdictional Statement points out that the

District Court dismissed the actions rather than staying proceedings while any purported state questions were being determined. In paragraph 1(c) of the Questions Presented portion of the statement, this action of the three-judge panel is challenged directly. (Jurisdictional Statement, p. 3). Appellees totally ignore the point in their Motion. Appellants submit that the question is deserving of additional consideration.

Since the Appellants filed their Jurisdictional Statement, the legislature of Nevada enacted a bill known as Assembly Bill #488. It was signed by the Governor of the State of Nevada April 20, 1967 and became law upon that date. Relevant excerpts are attached to this brief as Appendix A. The new statute expressly extends public utility regulation to community antenna television companies. It recites that "Upon investigation, the Legislature of the State of Nevada has determined that the rates, services and operations of community antenna television companies are affected with a public interest." (A. B. #488, Sec. 6.) In presenting the bill to Senate Judiciary Committee, two members of the State Public Service Commission appeared and stated that they viewed the bill as confirming their jurisdiction over community antenna systems. They stated that the Commission already had jurisdiction but that the bill clarified certain aspects of the law as it applied to details of regulation. Thus it is apparent that if there were, indeed, any unresolved state issues at the time of the decision of the three-judge panel, such questions have been settled by the legislative and executive branches of the state government. State policy fixing its determination to regulation

of community antenna systems is unmistakably clear. This court should take occasion to pass upon the serious and clearly presented constitutional issues in the exercise of its discretion and in view of the fact that the jurisdiction of the court to determine the matters presented upon appeal is conceded. See Appellees' "Statement of Jurisdiction", p. 8, Appellees' Motion to Dismiss or Affirm.

The state statute prevailing at this time and at the time of decision rendered by this court is controlling. *American Steel Foundries v. Tri-City C.T. Council* (1921) 257 U.S. 184, 66 L.Ed. 189, 42 S. Ct. 72; *Texas Co. v. Brown* (1922) 258 U.S. 466, 66 L. Ed. 721, 42 S. Ct. 375; *United States v. Alabama* (1960) 362 U.S. 602, 4 L. Ed (2d) 982, 80 S. Ct. 924. The new statute has the effect of placing even in clearer focus the constitutional questions presented by the Appellants' complaints and the record made at the hearing in the District Court.

In sum on this point, the determinations of the state agency prior to the filing of the complaint and during the pendency of the proceeding and the enactment of the new statute by the Legislature of Nevada during the pendency of this appeal demonstrate a considered state policy looking toward state public utility-type regulation of community antenna systems. State regulation not only is threatened, it is an accomplished fact unless enjoined by a court of competent jurisdiction. Jurisdiction of the trial court below was conceded in its opinion and jurisdiction of this court is conceded on appeal. No unresolved state questions

are suggested. The abstention doctrine, therefore, was improperly applied below and the decision of the trial court should be reversed. The circumstances of the case establish the necessity of full presentation to the court of the question of the application of the abstention doctrine where there are no state questions and in a case under Section 2281 where the constitutional issues are clearly presented and the District Court dismissed the complaint without a ruling on such issues.

C. *Substantial constitutional questions are presented on the merits.*

THE INTERSTATE COMMERCE ISSUE

The Appellees fail to respond directly to the Appellants' suggestion that a substantial question exists under the Interstate Commerce Clause. The interstate commerce issue is more than whether the proposed regulation of the State of Nevada constitutes an unreasonable burden in the usual sense; the question presented is whether the State of Nevada may *regulate* interstate communications facilities as public utilities without prior authorization by the Congress.

Nevada's contention that the Appellants' operations are purely intrastate (Motion to Dismiss or Affirm, p. 14) totally ignores the considered judgment of the FCC. The State fails to attempt to distinguish the teachings of *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23; *Buck v. Kuykendall* (1925), 267 U.S. 307, 69 L.Ed. 623, 45 S. Ct. 324, 38 A.L.R. 286, and *Bush & Sons v. Maloy* (1926), 267 U.S. 317, 69 L.Ed. 627,

45 S. Ct. 328. The principle firmly established by these cases is that a state may not regulate interstate commerce even though the federal government has not chosen to do so. Nevada, in the instant case, is not seeking simply to impose some oblique requirements incident to the operation of the system; it seeks to regulate Appellants' businesses as public utilities and claims to have jurisdiction over rates, conditions of service, ownership and all the other incidents of ordinary public utility control.

It is true that William Henry, then Chairman of the Federal Communications Commission, stated in 1965 that the federal agency did not contemplate regulation of community antenna systems on such matters as rates, conditions of service or the award of franchises (cf. Motion to Dismiss or Affirm, pp. 12-13). It is also true that in a press release issued in February, 1966, the federal commission recommended to Congress that any new legislation should provide for no federal preemption except to the extent of direct conflict with the provisions of the Communications Act. The Commission requested the Congress to "consider the appropriate relationship of federal to state—local jurisdiction over CATV systems (particularly with regard to initial franchises, rate regulation, and related matters)". That the federal agency asked Congress to consider these matters only underscores the point that congressional action is needed to authorise state regulation. The State of Nevada has taken upon itself the prerogative of Congress in purporting to exercise authority over interstate communications prior to congressional authority, based solely upon the recommendation

of the federal agency to Congress that the Congress should consider authorizing state control. Appellants suggest that Nevada lacks the power it asserts as a matter of constitutional law.

THE SUPREMACY ISSUE

Appellees attempt to sidestep the Supremacy issue. On pages 13 and 14 of the Jurisdictional Statement, Appellants summarized their position to the effect that the federal policy is that all interstate communications facilities except common carriers are not to be regulated as public utilities. *National Broadcasting Co. v. Board of Public Utility Commissioners* (1938 D.C. N.J.) 25 F. Supp. 761, was cited for the proposition that a state could not regulate broadcast stations as public utilities, even though the federal government did not do so under the Communications Act of 1934. The federal policy of no utility-type regulation is described in *F.C.C. v. Sanders Bros. Radio Station* (1940) 309 U.S. 470, 474, 84 L.Ed. 869, 874, 60 S. Ct. 693; *United States v. R.C.A.* (1959) 358 U.S. 334, 348, 3 L.Ed. 354, 79 S. Ct. 45. A number of circuit decisions reach the same result. cf. *Allan B. Dumont Laboratories v. Carroll* (CCA 3, 1950), 184 F(2d) 153. Appellants also pointed out that the federal agency had determined that community antenna systems are not common carriers under the federal statute. The extensive controls of Title II of the Communications Act (47 USCA 201-222) do not apply as a matter of existing federal policy. The question is, therefore, may a state regulate CATV systems as public utilities

in the face of the existing congressional determination fixing a no-regulation policy.

The State of Nevada cites *Dispatch, Inc. v. City of Erie,* (W. D. Pa., 1965) 249 F. Supp. 267, for the proposition that the federal government has not assumed jurisdiction of community antenna systems. This case was reversed by the Circuit Court of Appeals for the Third Circuit (CCA 3, 1966), 364 F(2d) 539. The Circuit invited the District Court to take judicial notice of the contents of Release G No. 79927 (364F(2d) at 541). This release is a summary of the Second Order and Report dated March 8, 1966 and cited extensively in the Appellants' Jurisdictional Statement. In other words, after the decision of the District Court in the *Dispatch* case, the Commission explicitly took jurisdiction over CATV operations and in a comprehensive order and report prescribed certain rules and regulations incident to their operation. Public utility-type regulation by Nevada would necessarily interfere and conflict with the federal policies announced in the Commission's Second Order and Report. While a detailed description of these conflicts is beyond the scope of this reply memorandum, it is clear that collisions are inevitable between present Commission rules and plenary state regulation. Among the conflicts are the following:

(a) The federal order requires community antenna systems to refrain from duplicating network programs broacast by local stations where the systems operate within the Grade B contour of the station (Second Report and Order, supra, para. 51-65.) This ruling constitutes a prohibition upon

the system from releasing certain television programs which its subscribers have heretofore obtained through such facilities. The state interest would be to make all programming available to the subscriber.

(b) The Commission prohibits community antenna operation without Commission consent in the top 100 markets of the country (Second Report and Order, supra, pars. 189-146). If a state was to issue a certificate of public convenience and necessity for the operation of a community antennt system in such a city—a right necessarily claimed by the State of Nevada—such a ruling would necessarily and directly conflict with the federal policy.

(c) The Commission required filing of information with respect to the ownership of all of the community antenna systems in the United States (Second Report and Order, supra, para. 99, 100). Moreover, the Commission has recently initiated a ruling making inquiry into the question of ownership patterns in the CATV industry and related matters. (Notice of Inquiry, FCC Docket No. 17371, ... Fed. Register ...., dated April 17, 1967). Thus the critical question of ownership is, according to the federal expert, within the power of the federal agency; whereas, under the Nevada legislation the state would have the power to control such questions.

(s) The Commission has stated that it has jurisdiction over CATV systems; (Second Report

and Order, supra, para. 8 et seq.; see its Memorandum on Jurisdiction attached to its Report and Order as Appendix C) that its study will continue (para. 150, 155 supra). *Ad hoc* procedures were established to pass upon individual problems (supra, para. 97, 98).

In a full presentation by briefs and argument the Appellants can demonstrate beyond reasonable question that state public utility regulation would necessarily conflict with the kinds of federal controls in existence under the existing act and administrative rulings.

THE FOURTEENTH AMENDMENT ISSUE

A substantial question exists under the Fourteenth Amendment. State regulation of Community antenna systems does not involve the ordinary type of public utility controls where the state agency is able to afford a degree of protection commensurate with the regulations imposed upon a given business. All facets of communication by radio other than specific common carriers are under the existing statutory scheme, subject only to the control of the United States. The federal government licenses and regulations the operation of commercial broadcast stations, VHF and UHF translators and boosters, and all other communications facilities which constitute the competition for Community antenna systems. The federal government regulates the microwave common carriers which feed signals of the originating station, and upon which the systems are totally dependent. The State's arguments at pages 10

through 14 of its Motion to Dismiss or Affirm entirely ignore these undisputed facts.

Plaintiff's systems are now operating by reason of proprietary and contractual rights obtained from the municipalities and the owners of utility poles in the communities where Appellants conduct their businesses. That the Appellants may have voluntarily contracted with the cities or the pole line companies to pay certain charges as an incident to the use of public streets and ways and utility company poles does not in any fashion alter their rights to raise the constitutional issues where the state seeks to superimpose public utility regulations upon their operations. There is no dispute in this case as to whether the plaintiffs have the private right necessary to operate their respective businesses; the only dispute is whether a state may constitutionally impose public utility controls in view of the relationship of community antenna systems to the existing federal regulatory scheme.

Appellants do not quarrel with the public utility concept in any abstract sense. They merely question the power of a state to subject CATV systems to public utility regulation in view of the fact that all of the substantial elements of their operation, and their competition, are within the sole power and control of the United States.

The District Court recognized that substantial constitutional questions were raised. It deferred a consideration of these issues on the erroneous grounds that the question as to whether Appellants' businesses constituted interstate commerce was a state rather than

a federal question. Appellants suggest that the reversal of the District Court upon this point is required and that this court should consider and pass upon the constitutional issues without the expenditure of time and money incident to the making of a record which would, in any event, only substantially duplicate the record made in the District Court.

More than 1600 community antenna systems are in operation throughout the United States. The FCC has taken notice of the possibility of wiring 85% of all television sets in the country—40 million homes. (Second Report and Order, supra, para. 88 and sources cited.) A number of states have adopted the view, either by statute or administrative ruling, that they have the power to impose regulatory controls. The court should exercise its power to decide the issues on their merits in view of the widespread industry and public interest. There is a real and urgent need for settling this controversy involving, as it does, the appropriate federal-state relationships in the dynamic communications area.

SUMMARY

From the reasons stated, Appellees' Motion to Dismiss and Motion to Affirm should be denied. The court should note probable jurisdiction.

RESPECTFULLY SUBMITTED this 2nd day of June, 1967.

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101

PAUL A. RICHARDS
248 South Sierra Street
Reno, Nevada 89505

Attorneys for Appellants

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Plaintiffs TV Pix, Inc. and Wells, TV, Inc., respectfully move the court for an order granting leave to said plaintiffs to file a Supplemental Complaint in the above entitled actions in substantially the form attached to this motion. This motion is made upon the following grounds:

1. This motion is filed pursuant to the provisions of Rule 15(c) of the Rules of Civil Procedure.

2. Subsequent to the filing of the Appellants' Jurisdictional Statement on appeal to the United States Supreme Court, and during the time when the said United States Supreme Court had jurisdiction of said appeal, to-wit: On April 20, 1967, the Governor of the State of Nevada signed into law an Act duly adopted by the Legisltaure of the State of Nevada, known as Assembly Bill #488. Said bill is known as Chapter 458, Nevada Revised Statutes, and was effective April 20, 1967. Relevant portions of said Act are attached to this pleading as Appendix A.

3. A.B. #488 establishes as public policy of the State of Nevada that said state has the right and power to regulate community antenna companies as public utilities and prohibits the operation of community antena companies without a certificate of public convenience and necessity issued by the Public Service Commission of the State of Nevada.

4. The issues raised by the enactment and adoption of A.B. #488, also known as 458 NRS, are the

same issues presented to the court by the plaintiffs' complaints in the above entitled cases and the issues framed by the pleadings therein. No new evidence will be required for an adjudication of the issues pleaded by the Supplemental Complaint.

3. The filing of the Supplemental Complaint is reasonably required for an adjudication of the rights, powers and duties of the parties as of the date of any decree issued by this court with respect to the merits of this cause. The filing of said Supplemental Complaint is reasonably required for the resolution and determination of the issues heretofore framed by the parties and the court.

RESPECTFULLY SUBMITTED this 2nd day of June, 1967.

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101

PAUL A. RICHARDS
248 South Sierra Street
Reno, Nevada 89505

Attorneys for Plaintiffs

SUPPLEMENTAL COMPLAINT

Plaintiffs complain of defendants and for cause allege:

1. Paragraphs 1, 2, 3, 4, 5, 6, and 7 of plaintiff's Complaint in the District Court in #1814 are incorporated herein by reference.

2. Paragraphs 2 and 3 of plaintiff's Complaint in the District Court in #1827 are incorporated herein by reference.

3. On or about the 20th day of April, 1967, the Governor of the State of Nevada signed a certain law duly enacted by the Legislature of said state known as Assembly Bill #488. Relevant portions of said bill are attached to this pleading as Appendix A. Under the provisions of said bill, the defendants are empowered and required to regulate the business affairs and operations of the community antenna systems owned and operated by the plaintiffs in Elko, Carson City, Stateline and Wells, Nevada. Said bill and the application by the defendants of the provisions of said bill would conflict with the provisions of Article I, Section 2; Article VI, and the Fourteenth Amendment to the Constitution of the United States and would further conflict and interfere with the Federal Communications Act of 1934 (47 USCA Sec. 151 et seq.) and certain rules, regulations, decisions and order of the Federal Communications Commission pursuant to said Federal Communications Act of 1934. The defendants have interpreted the business activities of the plaintiffs as constituting intrastate rather than interstate com-

merce; whereas, in fact and law, the community antenna systems owned and operated by the plaintiffs constitute a link in a chain of interstate commerce and constitute interstate communication by radio.

4. Paragraphs 10 and 11 of plaintiff's Complaint in #1814 and paragraph 11 of plaintiff's Complaint in #1827 are incorporated by reference.

5. Unless restrained by this court, the defendants will impose the provisions of A.B. #488, now known as NRS Chapter 458, upon the plaintiffs and will adopt regulations making orders and rulings pursuant thereto, and will otherwise subject plaintiffs to the requirements thereof.

WHEREFORE, plaintiffs pray that the court make and enter its orders as follows:

1. Permanently and temporarily enjoining, restraining and prohibiting the defendants or any of them, or their successors in interest, as members of the Public Service Commission of the State of Nevada, acting singly or in concert with any other persons, from enforcing or making effective or carrying out the provisions of A.B. #488, now known as Chapter 458 of the Nevada Revised Statutes, and particularly Sections 6, 8, 9, 11, 13, 15, 18, 19, 20, 21 and 22 thereof, and from imposing any regulations, orders or rulings with respect to the operation of plaintiffs' community antenna systems in the State of Nevada or adopting or making effective any rules, regulations or ordinances pursuant to the provisions of A.B. #488 and declaring and adjudicating that insofar as said A.B. #488 pur-

ports to enable the State of Nevada to regulate plaintiffs' community antenna systems as public utilities, the said enactment is null and void and of no further force or effect.

2. Making and entering a temporary restraining order and preliminary injunction restraining and prohibiting defendants from investigating or otherwise taking any jurisdiction over plaintiffs of its community antenna systems, or imposing any regulation with respect thereto, or otherwise endorsing or making effective the provisions of the Nevada statute known as A.B. #438, approved April 20, 1967, now known as Chapter 458, NRS, until a final hearing and determination of the issues in this cause upon the merits.

3. Determining and adjudicating that the community antenna systems owned and operated by the plaintiffs are engaged in interstate commerce.

4. Determining and adjudicating that the community antenna systems owned and operated by the plaintiffs are not public utilities and are not vested with a public interest, and that any purported or attempted regulation of such systems by the State of Nevada is contrary to the provisions of the Fourteenth Amendment to the United States Constitution.

5. Determining and adjudicating that the Government of the United States has fully occupied or has the power to fully occupy the field of interstate communication, including that portion of the communications industry involved in the operation of community antenna systems, and that the State of Nevada

has no lawful power to impose terms or regulations with respect to community antenna operation.

6. Making such temporary orders, injunctions and prohibitions as may be required to prevent the defendants or any of them, individually or in concert with others, from making effective the provisions of A.B. #488, also known as Chapter 458, NRS, insofar as the same is applicable or purports to be applicable to the operation of plaintiffs' community antenna systems in the State of Nevada.

7. Plaintiffs pray for their costs and disbursements herein and for such other and further relief as to the court shall seem just and equitable.

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101

PAUL A. RICHARDS
248 South Sierra Street
Reno, Nevada 89505

Attorneys for Plaintiffs

APPENDIX A

Assembly Bill No. 488—Committee on Judiciary

CHAPTER 458

AN ACT relating to community antenna television companies; providing for the issuance of certificates of public convenience and necessity by the public service commission of Nevada; granting the right of eminent domain; providing a penalty; and providing other matters proper relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 37.010 is hereby amended to read as follows:

37.010 Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

• • •

16. Community antenna television companies. Community antenna television companies which have received a certificate of public convenience and necessity from the public service commission of Nevada, including the right to use the wires, conduits, cables or poles of any other public utility when:

(a) It creates no substantial detriment to the service provided by the utility;

(b) It causes no irreparable injury to the utility; and

(c) The public service commission of Nevada, after giving notice and affording a hearing to all persons affected by the proposed exercise of the power of eminent domain, has found that such exercise is in the public interest.

SEC. 2. Chapter 318 of NRS is hereby amended by adding thereto a new section which shall read as follows:

No district proposing to furnish television facilities, as provided in section 29 of Senate Bill No. 408 of the 54th session of the Nevada legisature, may be organized which includes any area already served by a community antenna television company which possesses a certificate of public convenience and necessity from the public service commission of Nevada unless application is made to the public service commission of Nevada and the commission determines it necessary to revoke in whole or in part the certificate of the community antenna television company for the area involved.

SEC. 8. NRS 704.020 is hereby amended to read as follows:

704.020 1. As used in this chapter, "public utility" shall mean and embrace:

• • •

(d) Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.

(e) Radio or broadcasting instrumentalities [except those subject to the jurisdiction of the Federal Communications Commission] *providing common or contract service* and airship common and contract carriers.

(f) All companies which may own cars of any kind or character, used and operated as a part of railroad trains, in or through this state.

All duties required of and penalties imposed upon any railroad or any officer or agent thereof shall, insofar as the same are applicable, be required of and imposed upon the owner or operator of such automobiles, auto trucks or other self-propelled vehicles transporting persons or property for hire over and along the highways of this state as common carriers, express companies, telegraph and telephone, radio, broadcasting, airship companies, and companies which may own cars of any kind or character, used and operated as a

part of railroad trains in or through this state, and their officers and agents, and the commission shall have the power of supervision and control of such companies and individuals to the same extent as of railroads.

(g) Community antenna television companies.

2. "Public utility" shall also embrace:

• • •

The commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law.

3. The provisions of this chapter and the term "public utility" shall apply to:

(a) The transportation of pasengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the state.

(b) The receiving, switching, delivering, storing and hauling of such property, and receiving and delivering messages.

(c) All charges connected therewith, . . .

• • •

SEC. 4. Title 58 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth as sections 5 to 22, inclusive, of this act.

SEC. 5. This chapter may be cited as the Nevada Community Antenna Television System Law.

SEC. 6. 1. Upon investigation, the legislature of the State of Nevada has determined that the rates, services and operations of community antenna television companies are affected with a public interest.

2. It is the intent of the legislature in the enactment of this chapter to:

(a) Provide fair regulation of CATV companies in the interest of the public, to promote adequate, economical and efficient CATV system service to citizens and residents of this state;

(b) Provide just and reasonable rates and charges for CATV system services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

(c) Encourage and promote harmony between CATV companies and their subscribers;

(d) Cooperate with other states and with the Federal Government in promoting and coordinating efforts to regulate effectively CATV companies in the public interest; and

(e) Vest authority in the commission to regulate CATV companies generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this chapter.

SEC. 7. The words and phrases used in this chapter have the meanings ascribed to them in sections 8 to 12, inclusive, of this act unless a different meaning clearly appears in the context.

SEC. 8. "CATV company" means any person or organization which owns, controls, operates or manages a community antenna television system, except that such definition does not include:

1. A telephone, telegraph or electric utility regulated by the commission in a case where it merely leases or rents to a CATV company wires or cables for the redistributoin of television signals to or toward subscribers of such CATV company; or

2. A telephone or telegraph utility regulated by the commission in a case where it merely provides commu-

nication channel service under published tariffs filed with the commission to a CATV company for the redistributoin of television signals to or toward subscribers of such CATV company.

SEC. 9. 1. "CATV system" means any facility within this state which is constructed in whole or in part in, on, under or over any highway or other public place and which is operated to perform for hire the service of receiving and amplifying the signals broadcast by one or more television stations and redistributing such signals by wire, cable or other means to members of the public who subscribe to such service.

2. Such definition does not include:

(a) Any system which serves fewer than 50 subscribers; or

(b) Any system which serves only the residents of one or more apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such dwellings.

SEC. 10. "Commission" means the public service commission of Nevada.

SEC. 11. "Facility" means all real property, antennae, poles, wires, cables, conduits, amplifiers, instruments, appliances, fixtures and other personal property used by a CATV company in providing service to its subscribers.

SEC. 12. "Highway" means every street, road, alley, thoroughfare, way or place of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic.

SEC. 13. In determining whether a certificate of public convenience and necessity should be issued to a CATV company the commission shall take into consideration, among other things, the public need for the proposed service or acquisition, the suitability of the applicant, the financial responsibility of the applicant,

and the ability of the applicant to perform efficiently the service for which authority is requested.

SEC. 14. 1. If application is made to the commission within 90 days after the effective date of this act, or within 90 days after the final determination of any action or proceeding brought to contest the constitutionality of chapter 704 of NRS as applied to CATV companies which is pending on such effective date or which is commenced within 90 days after such effective date the commission shall issue a certificate of public convenience and necessity to any CATV company lawfully engaged in the construction, extension or operation of its CATV system on the date of approval of this act, for the construction, extension or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction, extension or operation and without further proceedings.

2. The construction, extension or operation of such a CATV system may be lawfully continued pending the filing of such an application and its disposition unless the commission orders otherwise.

3. An application for such a certificate which is untimely shall be determined in accordance with the procedure prescribed in chapter 704 of NRS and such certificate shall be issued or refused accordingly.

SEC. 15. The commission may, after affording an opportunity for hearing, order a CATV company to:

1. Construct and operate any reasonable extension of its existing CATV system within the certificated territory; or

2. Make any reasonable repair or improvement of or addition to such system.

SEC. 16. The commission shall from time to time visit the places of business and other premises and examine the records and facilities of all CATV companies

to ascertain if such companies have complied with the rules and regulations and orders of the commission.

SEC. 17. The commission may, after affording the holder an opportunity to be heard, revoke, suspend or alter any such certificate of public convenience and necessity for the willful violation of any provision of this chapter or chapter 704 of NRS or the rules, regulations or orders of the commission made under the authority of this chapter, or for other reasonable cause.

SEC. 18. The commission shall supervise and regulate every CATV company operating within this state and its property, easements, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of this chapter, and to do all things whether specifically designated in this chapter or chapter 704 of NRS or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.

SEC. 19. 1. Every CATV company and every person and organization providing any service, equipment or facilities thereto shall provide safe and adequate service, equipment and facilities for the operation of its CATV system.

2. No CATV company may demand or receive a greater, less or different compensation for providing CATV service than the rates and charges specified in the tariff in effect at the time.

3. All rates, charges and classifications for the service rendered by a CATV company shall be just and reasonable.

4. No CATV company may make any unjust or unreasonable discrimination in rates, charges, classifications, practices, regulations, facilities or services for or in connection with like service, directly or indirectly, by any means or device, or make or give any undue or unreasonable preference or advantage to any particular person, class of persons or locality, or subject

any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

5. Every CATV company and other person and organization shall obey and comply with the rules, regulations and orders adoted by the commission under the provisions of this chapter.

SEC. 20. 1. Upon the prior approval of the commission, any person or organization may contract to lease or rent facilities to a CATV company or to provide it with communication channel service for the redistribution of television signals to or toward the subscribers of such CATV company.

2. Any such contract which is in effect on the effective date of this act and which will be in effect for a period of more than 90 days thereafter shall be submitted to the commission for approval within 90 days after the effective date of this act, and if such contract is disapproved it shall become void.

SEC. No CATV company operating or managing a CATV system may combine, merge or consolidate with, or acquire control of, another organization in this state without first obtaining the approval of the commission, which shall be granted only after an investigation and finding that such proposed combination, merger, consolidation or acquisition is in the public interest.

SEC. 22. Any person, whether in his individual capacity or as an agent, employee or officer of any organization, who violates any provision of this chapter or any rule or regulation promulgated thereunder is guilty of a misdemeanor.

Signed by the Governor as Effective upon April 20, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

TV PIX, INC., ET AL. *v.* ALLARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

No. 79. Decided October 9, 1967.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court to give that court an opportunity to consider the appellants' motion to file a supplemental complaint based upon changes in the relevant Nevada law.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.